SUPREME COURT NO. 85789-0
(consolidated with 85947-7)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner

v.

GEORGE RYAN

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard Eadie, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

CHRISTOHER H. GIBSON
Attorney for Respondent

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ISSUE PRESENTED

Whether instructing the jury it must be unanimous to enter "no" on special verdict forms is error that may be raised for first time on appeal.

B. STATEMENT OF THE CASE

Ryan was charged with second degree assault and felony harassment for incidents in June 2009. CP 115-16; RCW 9A.36.021(1)(c); RCW 9A.46.020(1) (2). The State alleged both offenses involved the aggravating circumstance of being part of an ongoing pattern of domestic violence and abuse. On the harassment offense the State alleged as a sentencing enhancement that it was committed while Ryan was armed with a deadly weapon. CP 115-16; RCW 9.94A.535(h)(i); Former RCW 9.94A.602[1]; RCW 9.94A.533(4).

A jury found Ryan guilty of each offense. It also found the crimes were part of an ongoing pattern of domestic violence and abuse and that the harassment was committed while armed with a deadly weapon. CP 84-90. The court imposed a 76-month exceptional sentence, which

[1] RCW 9.94A.602 has been recodified as RCW 9.94A.825. Laws 2009, ch. 28, § 41.

includes six months for the deadly weapon. CP 94; 4RP[2] 23-35. Ryan appealed. CP 104-114.

On appeal, Ryan challenged the jury instruction that provides:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms.[3] In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have reasonable doubt as to this question, you must answer "no".

CP 79 (Instruction 18).

Relying on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Ryan argued the instruction improperly required the jury to be unanimous before it could answer "no" on the special verdict forms and that this was constitutional error that could be raised for the first time on appeal. Brief of Appellant at 24-29; Reply Brief of Appellant at 9-14. In response, the State argued an objection is necessary to preserve the argument for appeal. And even if it could be raised, the State's fall-back argument was that

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[2] There are four volumes of verbatim report of proceedings referenced as follows: 1RP – 11/9, 10 & 12/09; 2RP – 11/16 &17/09; 3RP – 11/18/09; 4RP – 12/18/09.

[3] The jury was provided with three "special verdict" forms; "Special Verdict Form A-2" asking whether the assault involved "domestic violence" and whether it involved "an ongoing pattern of psychological, physical or sexual abuse;" "Verdict Form B-2" asking the same questions for the harassment charge; and "Verdict Form B-3" asking whether Ryan was "armed with a deadly weapon at the time" he committed the harassment. CP 85-86, 88-90.

Bashaw does not apply to the aggravating factor verdict forms because RCW 9.94A.537(3) requires unanimous verdicts for aggravating factors. Brief of Respondent (BOR) at 19-27.

The Court of Appeals rejected the State's arguments, reversed Ryan's sentence and remanded for resentencing. State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011). This Court granted the State's petition and consolidated review with State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011), which held the same error could not be raised for the first time on appeal.

C. ARGUMENTS

1. AN INSTRUCTION REQUIRING UNANIMITY TO ANSWER "NO" ON A SPECIAL VERDICT FORM IS MANIFEST CONSTITUTIONAL ERROR.

Jury unanimity is not required to answer "no" to a special verdict concerning a potential sentence enhancement. State v. Goldberg, 149 Wn.2d 888, 893-95, 72 P.3d 1083 (2003). This Court reaffirmed Goldberg in Bashaw and reversed school bus zone sentence enhancements because the special verdict instruction contained language almost identical to that given Ryan's jury. Left unclear by Goldberg and Bashaw, however, is whether such instructions may be challenged for the first time on appeal. This Court should clarify that the flawed instruction constitutes

manifest constitutional error that may be challenged for the first time on appeal.

Manifest errors that affect constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3). For an argument to fall within RAP 2.5(a)(3), "the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alteration in original) (quoting State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007)).

Constitutional error is "manifest" if the appellant can show actual prejudice. To establish actual prejudice, the appellant must plausibly show the error had "practical and identifiable consequences in the trial of the case." O'Hara, 167 Wn.2d at 99 (quoting Kirkman, 159 Wn.2d at 935). If shown, the State bears the burden to prove harmlessness beyond a reasonable doubt. State v. Gordon, __ Wn.2d __, __ P.3d __, 2011 WL 4089893 at *2 (slip op. filed September 15, 2011).

a. Instruction 18 Violated Ryan's Constitutional Due Process Rights.

"To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his

theory of the case." O'Hara, 167 Wn.2d at 105. In O'Hara, this Court noted some instructional errors are "deemed automatically of a constitutional magnitude[,]" including "directing a verdict, shifting the burden of proof to the defendant, failing to define the 'beyond a reasonable doubt' standard, failing to require a unanimous verdict, and omitting an element of the crime charged." 167 Wn.2d at 103. The Court went on to note:

> On their face, each of these instructional errors obviously affect a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict. In contrast, instructional errors not falling within the scope of RAP 2.5(a), that is-not constituting manifest constitutional error-include the failure to instruct on a lesser included offense and failure to define individual terms. In each of those instances, one can imagine justifications for defense counsel's failure to object or where the jury could still come to the correct conclusion.

O'Hara, 167 Wn.2d at 103.

The error in Instruction 18 is not like failing to instruct on a lesser included offense, or failing to define a term. The instruction does not involve a simple omission; it instead affirmatively misleads the jury by telling it unanimity must be achieved before it can reject the aggravator. It is functionally equivalent to an instruction that fails to require a unanimous verdict, which this Court has identified as an instructional error of constitutional magnitude. O'Hara, 167 Wn.2d at 103. Failing to object

to an instruction that contributes to the likelihood of enhanced punishment cannot reasonably be considered justifiable.

Like the instructional errors the O'Hara court "deemed automatically of a constitutional magnitude[,]" Instruction 18 affected Ryan's constitutional right to due process and a fundamentally fair trial. As this Court has recognized, the wording of Instruction 18 creates a "flawed deliberative process" because it misleads the jury to believe it must be unanimous to answer "no" on the special verdict forms. Bashaw, 169 Wn.2d 147. Nothing in any of the other instructions negated or minimized this error. Even when read as a whole, the instructions fail to provide the correct legal standard for rejecting an aggravating factor. This constitutes a failure "[t]o satisfy the constitutional demands of a fair trial[.]" O'Hara, 167 Wn.2d at 105.

More specifically, a flawed deliberative process violates due process,[4] which, for example, requires the State to prove each essential

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[4] This is precisely the basis for the Court of Appeals holding in Ryan that this issue could be raised for the first time on appeal:

> The Bashaw court strongly suggests its decision is grounded in due process. The court identified the error as "the procedure by which unanimity would be inappropriately achieved," and referred to "the flawed deliberative process" resulting from the erroneous instruction. The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is

element of a crime beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, Section 22; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Accordingly, trial courts must accurately instruct juries as to each essential element of a charged crime and as to the State's burden of proving the elements beyond a reasonable doubt. State v. Chambers, 157 Wn. App. 465, 475, 237 P.3d 352 (2010), review denied, 170 Wn.2d 1031 (2011). The failure to do so is constitutional error. Gordon, __Wn.2d at __, 2011 WL 4089893 at *2.

A to-convict instruction's omission of elements is not the only type of instructional error implicating due process concerns regarding the jury's deliberative process. The improper removal of an otherwise competent juror from the deliberative process constitutes "manifest constitutional error." State v. Johnson, 125 Wn. App. 443, 456-57, 105 P.3d 85 (2005).

> the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative. We are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless.

Ryan, 252 P.3d at 897 (footnotes omitted); but cf. Nunez, 160 Wn. App. at 163; see also State v. Morgan, __ Wn. App. __ , __ P.3d __ 2011 WL 3802782 at *4-*5 (slip op. filed August 29, 2011) (agreeing with Nunez this error may not be raised for the first time on appeal).

And a misstatement of self-defense law can affect the deliberative process by, for example, overstating the degree of harm perceived necessary to justify the act of self defense, which unfairly increased the defense burden to prove the act was justified and reduces the State's burden to disprove the act was justified, and therefore may be raised for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

This Court recently considered whether unconstitutional judicial coercion of the deliberative process occurred when the trial court verbally instructed a jury it *had* to fill in a verdict form it initially left blank. State v. Ford, 171 Wn.2d 185, 250 P.3d 97 (2011). Although there was no objection at trial, this Court unanimously held the instruction was constitutional error. Ford, 171 Wn.2d at 188-89 (majority), 194 n.1 (Stephens, J. dissenting). The majority ultimately found the error not "manifest," however, because the jury had finished deliberating before the court gave the instruction. 171 Wn.2d at 193.

Instruction 18 was clear error that tainted the jury's deliberations by creating an improper unanimity requirement. Bashaw, 169 Wn.2d at 147. Similar to Goldberg, where the jury could not reach unanimity until told it had to, Instruction 18 forced unanimity by Ryan's jury on the special verdicts that may not otherwise have been achievable. As this Court noted in Bashaw,

> The error here was the procedure by which unanimity would be inappropriately achieved. In Goldberg, the error reversed by this court was the trial court's instruction to a nonunanimous jury to reach unanimity. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.
>
> The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. Goldberg is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

169 Wn.2d at 147-48 (citations omitted).

Moreover, instructing a jury it must be unanimous in order to reject an aggravating factor is akin to omitting an element of the crime or improperly shifting the burden of proof. Like those errors, Instruction 18 created an unwarranted burden on Ryan to convince *every* juror to reject the special verdicts rather than maintaining the burden squarely on the State to prove the existence of the aggravators beyond a reasonable doubt.

b. The Error Is "Manifest."

Unlike in Ford, the error here was not harmless beyond a reasonable doubt. Preliminarily, the erroneous instruction was given *before* deliberations began, so Ford's unusual prejudice-mitigating circumstance is absent.

As this Court held in Bashaw, the result of a flawed deliberative process reveals little about what conclusion the jury would have made had it been given a correct instruction. As it noted, "when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result." 169 Wn.2d at 147-48. As a result, this Court lacked the confidence to predict what jurors might have done with a proper instruction, and declined to find the instructional error harmless beyond a reasonable doubt.

The Court of Appeals in Ryan correctly followed Bashaw and found Instruction 18 adversely affected the jury's deliberative process. The instruction improperly burdened Ryan with convincing *every* juror to reject the special verdicts instead of just one. The Ryan court properly characterized the error as a violation of Ryan's right to due process and, ultimately, a fair trial, and therefore correctly concluded it could be raised for the first time on appeal. This Court should affirm.

2. THE DECISIONS IN NUNEZ AND MORGAN ARE WRONG.

The Court of Appeals in Nunez and Morgan acknowledge the instruction incorrectly imposes a unanimity requirement where none exists. Morgan, 2011 WL 3802782 at *3; Nunez, 160 Wn. App. at 156-57. Those courts reasoned, however, that the error violates no specific state or federal constitutional provision and therefore must be first raised in the trial court. Morgan, at 5-6; Nunez, 160 Wn. App. at 159-63. The Nunez court also reasoned the error was not "manifest" because there was no way to show it actually affected the deliberative process. Nunez, 160 Wn. App. at 163-65. These holdings are wrong.

The holding that flawed unanimity instructions do not constitute manifest error conflicts directly with Bashaw. As this Court recognized, flawed unanimity instructions taint deliberations by wrongly altering the process by which the jury reaches unanimity (or not), which, as discussed above, deprives the accused of due process and a fair trial. Bashaw, 169 Wn.2d at 147-48. Nunez should therefore be overruled on this point.

The Nunez court's conclusion that the erroneous instructions violated neither state nor federal constitutional provisions was primarily based on State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991), referenced in Bashaw, 169 Wn.2d at 146. See Morgan, at *5; Nunez, 160

Wn. App. at 160-61. Morgan and Nunez overstate Labanowski's significance in this context, however, and fail to appreciate the differences between the instructional issues addressed in Labanowski and Bashaw.

Labanowski involved the consolidated appeals of two unrelated defendants. The trial courts both used outdated lesser included offense instructions that required the jurors to unanimously find the accused "not guilty" of the greater offense before they could consider the lesser offense. 117 Wn.2d at 408, 411, 417. The trial courts had rejected defense-proposed instructions that made it clear the lesser offenses could be considered if the jury could not reach unanimity on the greater offense. 117 Wn.2d at 408-09, 412, 418.

This Court recognized a split among the courts as to whether the "acquittal first" or the "unable to agree" instruction was the proper instruction. It also noted some jurisdictions allow the accused to choose which instruction to give and recognized there are advantages and disadvantages for both the prosecution and the defense under either scenario. 117 Wn.2d at 417-23.

Labanowski specifically rejected the claim that the "acquittal first" instruction is unconstitutional because it infringes on the right to a jury trial and impacts the "beyond a reasonable doubt" standard. 117 Wn.2d at 423-24. In so holding, the Court noted authority from several jurisdictions

holding the "acquittal first" version violates neither due process nor a defendant's right to a jury trial. 117 Wn. 2d at 423 n.20.

This Court nevertheless held Washington law requires the "unable to agree" instruction, because it better serves the interest in judicial economy by, for example, avoiding retrials when a jury is unanimous on the lesser offense but not the greater. 117 Wn.2d at 422-23. That holding applies with equal force at present.

The Bashaw court cited Labanowski for the unremarkable proposition that a retrial, "even if limited to the determination of a special finding," "'exacts a heavy toll on both society and defendants by helping to drain state treasuries, crowding court dockets, and delaying other cases while also jeopardizing the interests of defendants due to the emotional and financial strain of successive defenses.'" Bashaw, 169 Wn.2d at 146 (quoting Labanowski, 117 Wn.2d at 420). But Bashaw did not rely on Labanowski for its conclusions that unanimity is not required to reject an aggravating factor and that affirmatively misleading the jury with a contrary instruction is reversible error. Bashaw was instead based on Goldberg. See e.g., 169 Wn.2d at 145-46 (noting issue decided in Goldberg and reaffirmed).

Bashaw does note that Goldberg rests not on constitutional double jeopardy concerns, but instead on "common law precedent". 169 Wn.2d at

146 n.7. The Nunez and Morgan courts seize on this reference to conclude the erroneous unanimity instruction violates no constitutional provision. Morgan, at 4-5; Nunez, 160 Wn. App. at 160-62. This reliance is misplaced because state laws can create liberty interests protected by the state and federal due process clauses, and that applies here.

Liberty interests may arise from state or federal constitutions, be implicit in the word "liberty," or be created by state law or policy. In re Pullman, 167 Wn.2d 205, 212, 218 P.3d 913 (2009). State law creates a liberty interest if it contains "'substantive predicates' to the exercise of discretion and 'specific directives to the decisionmaker that if the [law's] substantive predicates are present, a particular outcome must follow'." In re Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994) (quoting Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 463, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)).

Since at least 1991, state law in Washington has required jury unanimity to answer "yes" on a special verdict form, but not to answer "no." Labanowski, 117 Wn.2d at 422-23. This establishes a substantive predicate to a jury's exercise of discretion in responding to special verdicts, to wit: if a jury cannot unanimously agree, it must answer "no" on the special verdict form. In other words, the rule made clear in Labanowski specifically directs a jury to answer "no" on a special verdict

form when the jury is not unanimous. Under Cashaw, this constitutes a liberty interest that is subject to protection under the state and federal due process clauses. 123 Wn.2d at 144. Those portions of Morgan and Nunez holding to the contrary should be reversed.

3. THE LEGISLATURE HAS NOT DICTATED THAT JURIES MUST BE UNANIMOUS TO REJECT AN AGGRAVATING FACTOR ALLEGATION.

This Court should explicitly reject the State's claim that RCW 9.94A.537(3) requires unanimity to reject an aggravating factor.[5] See BOR at 23-25. This Court implicitly rejected it in Goldberg, when it reversed an exceptional sentence based on the trial court's insistence that the jury had to be unanimous to answer "no" on the special verdict. 149 Wn.2d at 893-94.

Similarly, Bashaw and it progeny hold it is error to require a jury to be unanimous to answer "no" on any special verdict form. See e.g., State v. Campbell, __ Wn. App. __, __ P.3d __, 2011 WL 3903428 at *3 (slip op. filed September 6, 2011)[6] (firearm enhancement); Nunez, 160 Wn. App. at 156-57 (school bus zone enhancement); Ryan, 160 Wn. App.

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[5] The State makes no such claim with regard to sentence enhancements.

[6] The Campbell dissent agreed it is error to require unanimity to answer "no" on a special verdict form. 2011 WL 3903428 at 9 (Appelwick, J., dissenting).

at 949 (deadly weapon enhancements and aggravating factors). The Legislature has never indicated disagreement with Goldberg or taken steps to clarify its position following Bashaw. It therefore is presumed to acquiesce with those holdings. State v. Ervin, 169 Wn.2d 815, 825, 239 P.3d 354 (2010).

4. RYAN ADOPTS BY REFERENCE ARGUMENTS PRESENTED BY PETITIONER NUNEZ.

In accordance with RAP 10.1(g), Ryan adopts the legal arguments presented in the supplemental brief filed by Petitioner Nunez.

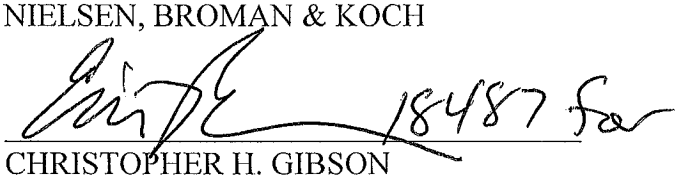
D. CONCLUSION

For the reasons stated, this Court should affirm the Court of Appeals decision in Ryan, and reverse the decisions in Nunez and Morgan.

DATED this 10th day of October 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Respondent Ryan

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF OCTOBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WASHINGTON APPELLATE PROJECT
1511 3RD AVENUE
SUITE 701
SEATTLE, WA 98101

[X] GEORGE RYAN
DOC NO. 795324
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF OCTOBER, 2011.

x Patrick Mayovsky